No. 11653.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Oscar Schatte, Raymond E. Conaway, Andrew M. Anderson, Charles L. Davis, Harry Beal, Arthur Djerf, Ewald K. Albrecht, Harry L. Talley, Harry Davidson, John L. Kierstead, Thomas W. Hill, Lloyd C. Jackson, Alfred J. Withers, John H. Zell, and Edward Derham, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANTS.

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Appellees.

REPLY BRIEF OF APPELLANTS.

Request for Judicial Notice.

Appellees IATSE, Walsh and Brewer, at page 63 of their brief, have requested the court to take judicial notice of *Schatte, et al. v. International Alliance, etc,. et al.*, No. 7304-PH, filed in the United States District Court at Los Angeles on July 2, 1947, as follows:

"It is further submitted that this court has the right to take judicial notice of actions pending in the various district courts of the United States comprising the 9th Circuit, that involve the identical liti-

> gation that is here presented, and we therefore ask this court to take judicial notice of the action of *Oscar Schatte, et al. v. International Alliance, etc., et al.*, being No. 7304-PH in the office of the Clerk of the District Court of the United States in and for the Southern District of California, Central Division, which said action was filed on July 2, 1947. In that action, certain of the plaintiffs in this action are plaintiffs there and the defendants herein are made defendants therein. The plaintiffs in that action have specifically pleaded and have specifically attempted to set forth causes of action under the Federal Anti-Trust Laws and under the Labor Management Relations Act based on the same factual situation here concerned. * * *"

Appellants consent for the court to take judicial notice of said suit, and are ready, at the court's pleasure, to present herein printed copies of the amended and supplemental complaint filed therein on October 20, 1947, which will show:

1. That the plaintiffs, who are appellants here, and others, are the plaintiffs there; and that all appellees here, without others, are the defendants there.

2. That said suit is for damages only, and is in three counts, under the Taft-Hartley, Civil Rights, and Sherman Acts, respectively, while this case on appeal is for Declaratory Relief alone.

3. That said new action contains allegations of material and substantial facts that existed before the suit on appeal was filed, but that were first disclosed before the Congressional Sub-committtee, of the House Committee on Education and Labor, in hearings at Los Angeles during August and September, 1947, and also contains al-

legations of material and substantial developments subsequent to the effective dates of the Taft-Hartley Act.

It is respectfully submitted that the foregoing may be properly considered by this Honorable Court upon the sole issue involved in this appeal, of Federal jurisdiction, without diversity of citizenship, in cases arising under the Constitution and laws of the United States.

I.

Appellants' Constitutional Right to Work: Under Their Long-Standing Employment, and Concurrent Collective Bargaining Agreement.

Reference is made to the opening brief, page 30, for the statement of this proposition, and to the case there quoted. The following is added in reply to appellees' briefs.

Reference is also made to the statement of the case in the opening brief, showing:

The Carpenters' historic employment and right to carpenters' work (Op. Br. p. 10);

The Carpenters' collective bargaining agreement (Op. Br. p. 10);

The Carpenters' long-standing contracts of July 9, 1921, with the appellee IATSE, acknowledging the Carpenters' right to carpenters' work (Op. Br. p. 11);

The arbitration agreement to determine differences between the Carpenters and the IATSE, and appellee Companies and Association, in the administration of said contracts (Op. Br. p. 12);

The arbitration report of December 26, 1945 (Op. Br. p. 14), as clarified by the arbiters on August 16, 1946 (Op. Br. p. 16);

The compliance with the award and clarification by the Carpenters (Op. Br. p. 17);

The violation of the contracts and arbitration award and clarification, by appellees (Op. Br. pp. 15, 17, 18);

The conspiracy between the IATSE and the appellee Companies, and Association, in violation of the contracts and award as clarified (Op. Br. pp. 20-23).

Appellants' Individual Rights Under Contracts.

J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762, was quoted in the opening brief (p. 48). It is now more fully quoted, point by point, first relative to the contract, at 766:

> "Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit."

It is submitted that the present Exhibit "A" interim agreement, which specifically covers "wage scales, hours of employment, and working conditions" [R. 33], measures to this standard, to "govern hiring and work and pay in that unit."

The opinion then states the relation of collective bargaining agreements to individual employment, at 766:

> "The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone."

Said allegations in the present case show that the employment ran concurrently with said successive and continuous collective bargaining agreements.

The opinion continues, in its statement of the rights of the individual employee under collective bargaining agreements, at 766:

> "The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established * * *."

This language establishes the rights of the individual carpenter employees under their current Exhibit "A" collective bargaining agreement.

The Court then determined the issue in this case, by holding that these rights arise "by virtue of," that is, under the laws of the United States, in the language we italicize, as follows:

> "*But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act* somewhat as a third party beneficiary *to all benefits of the collective trade agreement,* * * *." (Italics ours.)

Appellants' Right of Action.

Gaskill v. Roth, 151 F. (2d) 366, contains the following concise statement of the rights of appellants, and the class for whom they sue, under said collective bargaining contract, and of their right of action for its breach, at 371:

> "Through the diligence of counsel our attention has been directed to all of the many cases involving the right of railroad employees to maintain action in the courts as individuals or through unions or as members of a class claiming rights under the collective bargain agreements negotiated as contemplated by the Railway Labor Act, 45 U. S. C. A., §151 *et seq.,* and they have been considered. *But in this case the trial court fully recognized the plaintiffs' right to sue the railroad upon the collective bargain agreement ('A' and 'B') and declared as the law that when a collective bargain has been duly established the carrier is not at liberty, so long as the bargain exists, to violate it."* (Italics ours.)

Certiorari was denied April 1, 1946, 327 U. S. 798, 90 L. Ed. 1024. A rehearing on the petition for certiorari was denied August 29, 1946, 328 U. S. 879, 90 L. Ed. 1645.

This case, establishing the principle that the employer is not at liberty, so long as the collective bargaining contract exists, to violate the contract, and that the employees have a right of action based upon its violation, was an

> "Action by Barney E. Gaskill and others against Claude A. Roth, trustee of the property of the Chicago & North Western Railway Company, and others, for a declaratory judgment regarding plaintiffs' rights under contract with the defendant railroad."

II-III.

II. Declaratory Relief Proper Remedy to Determine Rights and Obligations of Parties Under Contracts, Including Collective Bargaining Agreements; and

III. Including Motion Picture Collective Bargaining and Employment Contracts.

Reference is made to the opening brief, at pages 31-34, and 35-38, respectively, for the statement and discussion of these propositions.

Reference is made to the following paragraphs of the Complaint [R. 8, 20]:

Paragraphs XII [R. 8], XXXII and XXXIII [R. 20], of the Complaint, allege the controversy that has arisen since the Exhibit "D" December 26, 1945, arbitration award [R. 42], and Exhibit "F" August 16, 1946, clarification thereof [R. 57], were made by the American Federation of Labor, acting by and through its Executive Council, and Three-Man Committee thereof.

Paragraph XXXIV [R. 21], alleges the public interest involved.

Paragraphs II to VIII, inclusive, of the second cause of action [R. 22-27], allege the conspiracy between each and all appellees:

> "* * * to injure plaintiffs in their persons and property in the exercise of rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States, in that said defendants conspired and continue to conspire each with the other to deprive plaintiffs of the right and privilege to work at their chosen vocation, to-wit: studio carpenters, and to interfere with, obstruct, impede, and

hinder said plaintiffs in the free and unhampered exercise of said right and privilege; that said conspiracy has resulted and continues to result in great damages to plaintiffs in the loss of wages."

If the court takes judicial notice of case No. 7304-PH, as requested by appellees IATSE, *et al.*, in their answer brief (p. 63), and as consented to by appellants (*supra,* 1-3), reference is also made to paragraphs XI to XXVIII, inclusive, of the amended and supplemental complaint therein (pp. 6-35), showing the new developments that will be embodied in an amended and supplemental complaint herein, if and when this case is remanded.

Reference is now made to the cases hereinbefore quoted, and to the cases quoted in the opening brief, at the pages indicated, showing that declaratory relief is the proper remedy in this case:

Gaskill v. Roth (*supra*);

Peoples Bank v. Eccles, 64 Fed. Supp. 811 (O. B. 31);

Mississippi Power & Light Co. v. City of Jackson, et al., 116 F. (2d) 924, at 925 (O. B. 32);

Oil Workers International Union, etc. v. Texoma Natural Gas Co., 146 F. (2d) 62, at 65 (O. B. 34);

Columbia Pictures Corp. v. DeToth, 26 Cal. (2d) 753, 756 (O. B. 35), as also reported in 162 A. L. R. 743 (O. B. 36);

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66 (O. B. 37), as quoted more fully in the appendix of the opening brief (pp. 8-16).

IV-V.

IV. Jurisdiction Under National Labor Relations Act;

V. In This Case Where Actions Complained of Constitute an Attempt to Nullify Act.

Reference is made to the opening brief, at pages 39-50, and 51-52, respectively, for the statement and discussion of these propositions.

National Labor Relations Act, Section 7, 29 U. S. C. A. 157:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Reference is now made to the following cases, showing the jurisdiction of Federal courts in cases arising under the Constitution and laws of the United States:

J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762, at 766 (O. B. 48);

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (O. B. 49, 50);

American Federation of Labor, et al., v. J. Tom Watson, et al., 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873, at 878 (O. B. 52).

Appellee companies on page 3 of their brief, cite and quote *Shulthis v. McDougal,* 225 U. S. 561, 569, 56 L. Ed. 1205, at 1211, as follows:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

The present case does involve the construction, effect, and very life purpose of the Act, as has been shown.

Cleveland C. C. & St. L. Ry. Co. v. Hirsch, 204 Fed. 848, at 851, discloses the significance of the *Shulthis* case, as follows:

> "* * * although the amended bill does not in all respects strictly comply with the rule touching jurisdictional averment, yet we think enough is definitely stated, without resorting to argumentative inference (Schulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205), to show that the controversy arises in material part under the Interstate Commerce Act. Since a correct decision of the case must depend on the construction of portions of that law, jurisdiction of the court below sufficiently appears. The familiar rule laid down by Chief Justice Marshall (Cohens v. Virginia, 6 Wheat. at 379, 5 L. Ed. 257) furnishes the answer to this feature of the demurrer:

" 'A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.'

"So in Tennessee v. Davis, 100 U. S. 257, 264 (25 L. Ed. 648), the court said:

" 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.' "

The present case measures to all these requirements. The rights of appellants, as plaintiffs, arose "by virtue of the Labor Relations Act," and therefore have the standing in law determined in *J. I. Case Co. v. National Labor Relations Board* (*supra,* 4-5).

The action of appellees, as conspiring defendants, in seeking to abrogate the employment, and the collective bargaining contract, made and now existing under the Act, is the basis for "plaintiffs' right to sue," as determined in *Gaskill v. Roth* (*supra,* 6).

Arbitration Remedy Exhausted.

Appellants have exhausted their remedy before the American Federation of Labor, to which both Unions belong. and have received an award from the Committee named by and representing the A. F. of L. (O. B. 14, 44), and a clarification thereof by said Committee (O. B. 16, 46),

entitling them, as carpenters, to do the carpenters' work in the studios, and on the lots and locations, of the appellee Motion Picture Companies, in accordance with their employment, their collective bargaining contract, and their historic allocation of work.

No Adequate Administrative Remedy Available.

There is no adequate administrative remedy available to protect these rights of appellants from the conspiracy of appellees to abrogate their employment, and their collective bargaining agreement under the Act, and to thereby, in effect, nullify the Act itself, in so far as it relates to these appellants and their rights. It is submitted, therefore, that there can be no question of the court's jurisdiction.

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, at 182, has been quoted in the opening brief (pp. 49-50). It is again quoted in part, and we submit in relevancy, as follows:

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. The right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. * * * there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford

a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in Texas & N. O. R. Co., Brotherhood of R. & S. S. Clerks, *supra* (221 U. S. 556, 557, 560, 74 L. Ed. 1039, 1041, 50 S. Ct. 427), and in Virginia R. Co. v. System Federation, R. E. D., *supra* (300 U. S. 548, 81 L. Ed. 799, 57 S. Ct. 592), and like it is one for which there is no available administrative remedy."

Administrative Finding Not a Prerequisite.

Earl Moore v. Illinois Central Railroad Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1039, at 1092:

"But respondent says that there is another reason why the judgment in its favor should be sustained. This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act (May 20, 1926) 44 Stat. at L. 577, chap. 347, as amended June 21, 1934), 48 Stat. at L. 1185, chap. 691, 45 U. S. C. A. * * * 151 *et seq.* But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. * * *."

VI.

Jurisdiction Under Constitutional and Civil Rights Act.

Reference is made to the opening brief, at pages 53 to 57, for the statement and discussion of this proposition, and to page 30 for the statement on the right to work, and to the following cases as there quoted:

Nissen v. International Brotherhood of Teamsters, etc., et al., 229 Iowa 1028, 295 N. W. 858; 141 A. L. R. 598, at page 614 (O. B. 30);

Steele v. Louisville & Nashville R. R. Co. (*supra;* O. B. 49-50);

American Federation of Labor v. Tom Watson (*supra;* O. B. 52);

Picking v. Pennsylvania R. Co., 151 F. (2d) 240, at 244 (O. B. 53);

Bartling v. C. I. O., 40 Fed. Supp. 366 (O. B. 55);

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, at 1327 (O. B. 56).

If the court takes judicial notice of No. 7304-PH (*supra* 1-3), reference is also made to the second count of the amended and supplemental complaint therein, and to paragraphs XI to XXVIII of the first count, as therein adopted, particularly to page 26, lines 9 to 13, inclusive, and lines 30 to 32, inclusive.

VII.

Jurisdiction Under Sherman Anti-Trust Act.

Reference is made to the opening brief, at pages 58 to 62, for the statement and discussion of this proposition, and to the answer brief of appellees IATSE, *et al.,* at page 63, for the statement hereinbefore quoted (*supra* 1-3).

From appellees' statement that a cause of action arising under the Sherman Act has been pled in said suit No. 7304-PH, it is respectfully submitted that the court should assume that it has been adequately pled, and that the court has jurisdiction thereunder. If the court takes judicial cognizance of said case No. 7304-PH, reference is made to the third count therein, pages 37 to 40, inclusive.

Attention is called to the cases cited in the opening brief:

Loew's, Incorporated v. Basson, et al., 46 F. Supp. 66, as quoted extensively in the appendix to the opening brief (pp. 8-16), where federal court jurisdiction was asserted and established by Loew's, Incorporated, one of the defendants here, as plaintiff there.

Allen Bradley Company, et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al., 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939, at 1942 (O. B. 60), where federal court jurisdiction was likewise established, and upheld by the Supreme Court.

VIII.

Jurisdiction Under the Labor-Management Relations Act of 1947. (Taft-Hartley Act.)

Reference is made to the opening brief, at pages 63 to 67, for the statement and discussion of this proposition. Section 301(a) (O. B. 64), gives federal court jurisdiction, while Section 303(a) (O. B. 65), gives the statutory causes of action.

The Taft-Hartley Bill was enacted after the order of dismissal, and appeal, in this case, but we submit the jurisdiction given by it applies to this case under the following authority:

> *Federal Deposit Ins. Corporation v. George-Howard,* 153 F. (2d) 591, at page 593 (O. B. 66).

Ziffrin v. United States, 318 U. S. 73, 87 L. Ed. 621, at 625:

> "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law. Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 85 L. ed. 327, 61 S. Ct. 347, and cases cited. *Cf.* Duplex Printing Press Co. v. Deering, 254 U. S. 443, 464, 65 L. ed. 349, 355, 41 S. Ct. 172, 16 A. L. R. 196."

Public Utilities Com. v. United Fuel Gas Co., 317 U. S. 456, 63 S. Ct. 369, 87 L. Ed. 396, at 402:

> "It is familiar doctrine that an appeal in an equity suit opens up inquiry as of the time of the ultimate decision. To decide this appeal on the basis of a legal situation that ceased to exist not only prior to the taking of this appeal but also before issue was finally joined in the District Court, would be to make a gratuitous advisory judgment. It is the case that is here now that must be decided, and it must be

decided on the basis of the circumstances that exist now. *Cf.* Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 542, 543, 85 L. ed. 327, 329, 330, 61 S. Ct. 347, and cases there cited."

Vandenbark v. Owens-Illinois Glass Company, 311 U S. 538, 61 S. Ct. 347, 85 L. Ed. 327, at 329:

> "While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees. It has vacated judgments of state courts because of contrary intervening decisions, and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it. Where, after judgment below, a declaration of war changed the standing of one litigant from an alien belligerent to an enemy, this Court took cognizance of the change and modified the action below because of the new status."

Federal Reserve Bank of Richmond v. Kalin, 77 F. Rpt. (2d) 50, at 51:

> "* * * It is clear that the grant of jurisdiction given by the statute applies to causes of action in existence at the time of its passage as well as to those subsequently arising 'Statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before.' Link v. Receivers of Seaboard Air Line Ry. Co. (C. C. A. 4th), 73 F. (2d) 149, 151; Hallowell v. Commons, 239 U. S. 506, 36 S. Ct. 202, 60 L. Ed. 409; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. Ed. 231.
>
> "For the reasons stated, we think that the court below had jurisdiction of the action, and that the order dismissing it should be reversed."

Conclusion.

Reference is made to the conclusion in the opening brief, at pages 68 to 70.

It is respectfully submitted:

That the public interest, at this critical time in our country's history, requires a clear-cut, judicial determination that no industry is big enough, that no labor organization is strong enough, and that no combination is powerful enough to nullify the laws of the United States. (O. B. 52.)

That court interpretation of the rights and responsibilities of all concerned, in fairness to all, is essential to replace the law of the jungle, arising from the conspiracy of the appellees, with the law of the land, in Hollywood labor-management relations.

That there is no remedy available, or sufficient, as a substitute for court action. That determination of the rights and responsibilities of all concerned, by declaratory judgment, is the right and most expeditious remedy.

That, if the declaratory judgment goes unheeded, and is treated with the same contempt as the award and clarification rendered by the American Federation of Labor has been treated, then, perhaps, those who hold themselves above law could be brought within the realm of law by the use of a Special Master.

Respectfully submitted,

Zach Lamar Cobb,

Attorney for Appellants.